

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN,
ELVIRA BUMPUS, RONALD BIENDSEI,
LESLIE W. DAVIS, III, BRETT ECKSTEIN,
GEORGIA ROGERS, RICHARD
KRESBACH, ROCHELLE MOORE, AMY
RISSEEUW, JUDY ROBSON, JEANNE
SANCHEZ-BELL, CECELIA SCHLIEPP,
TRAVIS THYSSEN and CINDY BARBERA,

Case No. 11-C-562
JPS-DPW-RMD

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE
MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN,
DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND,
TIMOTHY VOCKE, and KEVIN KENNEDY,
Director and General Counsel for the Wisconsin
Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR.,
THOMAS E. PETRI, PAUL D. RYAN, JR.,
REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants

VOCES DE LA FRONTERA, INC., RAMIRO
VARA, OLGA VARA, JOSE PEREZ, and
ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, TIMOTHY
VOCKE, and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin Government
Accountability Board,

Case No. 11-CV-1011
JPS-DPW-RMD

Defendants.

**Defendants' Opposition to Motion for Leave to Appear as *Amici Curiae* of Bill
Krause, Louis Fortis, Julilly Kohler, Angela Kvidera, Bruce Thompson and
Don Wallace**

Defendants Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane,
Thomas Barland, and Kevin Kennedy (each in their official capacity), by the undersigned
attorneys, submit this brief in opposition to the motion of Bill Krause, Louis Fortis,
Julilly Kohler, Angela Kvidera, Bruce Thompson and Don Wallace for leave to appear as
amici curiae.

There are four independent reasons why the motion should be denied. First,
amicus briefs are generally appropriate only when the *amici* have a unique perspective or
special interest in the litigation or when a court feels that existing counsel need
assistance. In this case, the *amici* are a group of self-defined "concerned citizens" who
identify no unique perspective or interest in this litigation, nor do they identify any reason
why existing counsel need assistance. Second, of the brief's 19 pages, only 2½ are
addressed to the issue before the Court—the legality of 2011 Wisconsin Acts 43 and
44—and in those 2 ½ pages, *amici* simply make broad assertions why they believe that

the elements of a two-part test for political gerrymandering claims are met, with no seeming awareness that the U.S. Supreme Court threw out this two-part test nearly eight years ago. This is not helpful.

Third, the object of the remainder of the brief and supporting affidavit is improper. *Amici* seek to put before the Court a proposed alternate map that is, according to *amici*, more neutral¹ than the one enacted by the Legislature. But pursuant to this Court's prior orders in this case, alternate statewide redistricting plans will not be considered in the initial trial of this matter and only in the event that 2011 Wisconsin Acts 43 and/or 44 are found invalid will it "schedule a separate hearing to determine the need for and substance of any appropriate judicial remedy or remedies." Thus, *amici's* proposed submission is, at best, premature.²

Fourth, but most important, even were this proposed alternate plan submitted at an appropriate time, it is simply, fundamentally inappropriate. *Amici* expressly acknowledge in their brief that their proposed map is "not based on the challenged legislative plan, but is a complete departure from it." The U.S. Supreme Court noted (again) just last week, that when a district court attempts to draw a legislative map, it must look to and be guided by the legislative choices embedded in the State's map, even if that plan has been found to violate the Constitution or the Voting Rights Act. A plan that completely overhauls one passed by the legislature is not appropriate. As such, the plan submitted by *amici* will never be helpful, irrespective when it is submitted.

¹ As noted below, *amici's* version of neutrality includes labeling districts with Democratic voting majorities as "Republican" districts.

² Making an exception to this order would result in unfair prejudice to Defendants. The brief and its accompanying affidavit are in large measure an expert witness report of the drafter of the proposed map, Frederick Kessler, but Defendants have not been afforded an opportunity to depose and cross-examine Mr. Kessler and have their own expert witnesses offer rebuttal testimony.

For any or all of these reasons, Defendants respectfully request that this Court deny the motion for leave to appear as *amici curiae*.

Argument

I. *Amici* Have No Unique Perspective or Interest in this Lawsuit.

First, granting leave to appear as an *amici curiae* is an act of "judicial grace" and should not be granted routinely, particularly where, as here, the request is opposed. *Dekeyser v. Thyssenkrupp Waupaca Inc.*, 2009 WL 5214418, *1, n. 1 (E.D. Wis. 2009). "[A] district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." *Id.* (quoting *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir.1970)); see also *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (policy of Seventh Circuit is to "grant permission to file an amicus brief only when (1) a party is not adequately represented ...; or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may ... materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do").

In this case, the would be *amici* are a self-described "group of concerned citizens" who fail to identify any special interest or unique perspective that the parties to the case would be unable to present. They also make no attempt to show that counsel is in need of assistance. This is really a "friend of the party" brief, and as such, shouldn't be allowed. *Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997)

("The vast majority of amicus curiae briefs are filed by allies of the litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief. Such amicus briefs shouldn't be allowed.").

II. The Only 2½ "Relevant" Pages of Their Brief Are Premised on Overruled Law.

Of the brief's 18 pages, only 2½ are devoted to the question before this panel: The validity of 2011 Wisconsin Acts 43 and 44. In those 2½ pages—pages 6 through 8—the would-be *amici* offer broad and generic platitudes that Act 43 is "unabashed political gerrymandering" along with a handful of citations to the U.S. Supreme Court's opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986). Specifically, they recite the two-part test for political gerrymandering adopted by a plurality of justices in *Bandemer* and then make general, conclusory assertions that those two elements are met.

This "analysis" is not helpful. It appears that the would-be *amici* are unaware that the two-part *Bandemer* test was thrown-out by a majority of justices in *Veith v. Jubilerer*, 541 U.S. 267, 283-84, 308 (2004) (plurality holding that *Bandemer* test was misguided when adopted and refusing to affirm it; concurrence noting agreement with plurality decision to do away with *Bandemer* test). A generic claim that Acts 43 and 44 do not satisfy the elements of a test rejected by the United States Supreme Court is not helpful. Especially when it comes from a few random members of the public who are trying to defeat what the public's elected representatives adopted.³

³ The substance of the proposed *amici*'s brief is also not helpful because it does not apply the now defunct *Bandemer* test appropriately. They argue that the second element of the two-part test—actual discriminatory effect to an identifiable political group—is met because the percent of the state legislature they project will be held by Republican legislators will be greater than the percentage of Republican voters in the state. *Bandemer* explicitly rejected the notion that this kind of showing would be sufficient to meet the second element. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination").

Not only is the *Bandemer* test on which the would-be *amici* rely no longer the governing standard, there is no new standard at all. Indeed, there is no agreement that political gerrymandering claims are even justiciable. *Veith*, 541 U.S. at 305 (four justice plurality holding that political gerrymandering cases are not justiciable because there is no relevant, workable standard on which to judge them) and 311-12 (concurrence agreeing that no one yet had come up with a workable standard but disagreeing that no one ever could).⁴ Thus, the central question at the heart of any political gerrymander claim is whether an appropriate standard can be found and if so, what it is. The would-be *amici* address neither of these issues.

III. This Court Has Ordered That It Will Not Consider Alternate Maps Prior to Trial And Accepting The Proposed *Amici* Brief Would Deny Defendants Their Due Process Cross-Examination Rights.

The remainder of the proposed *amici* brief is even less appropriate because it violates the order controlling the presentation of this case to the Court. The heart of *amici's* request is to introduce a map drawn by Democratic State Assembly member, Frederick P. Kessler, which they claim meets all of the constitutional and statutory guidelines for legislative districting and, according to them, has the added bonus of being neutral and promoting competitiveness.⁵ This Court ruled in its November 14, 2011 scheduling order that "[t]he Court shall not entertain any alternative statewide redistricting plans at this initial trial. Rather, should there be a determination that the redistricting statute is invalid, the Court *may* schedule a separate hearing to determine *the need for* and

⁴ The Court again took up the issue of political gerrymandering two years later in *League of United Latino American Citizens v. Perry*, 548 U.S. 399 (2006) but remained unable to find a relevant, workable standard.

⁵ The group's claim to neutrality is, even at first blush, highly suspect. Mr. Kessler starts with the proposition that a district is a "Republican district" if prior voting reflects a 46.6% or greater population of Republican voters. In other words, a district may be regarded as a Republican district even if it has a Democratic voting majority.

substance of any appropriate judicial remedy or remedies." *Order*, dkt. # 35, at ¶ 5 (Nov. 14, 2011) (emphasis supplied).

Not only has this Court already ordered that it will not consider proposed alternate maps at this time, deviation from this order to allow the proposed *amici* brief implicates Defendants' due process rights. For all intents and purposes, the brief is an expert witness report sneaked in after the deadline for exchange of such reports: the "fact" section does not discuss either 2011 Wisconsin Act 43 or 44 but is instead comprised of subsections entitled "The Map Author's Experience," "The Map Methodology" and "The Map's Results," while the argument section, but for its first 2½ pages, goes on at length to tout the virtues of and policy choices embedded in the proposed map over those of the map that the Legislature selected. Similarly, the affidavit of Frederick P. Kessler submitted with the proposed brief is nothing short of a traditional expert witness report: it lays out first, Mr. Kessler's credentials, followed by the methodology he used in creating the map.

Expert reports were due on December 14, 2011 and rebuttal reports were due on January 13, 2012. Neither of the plaintiff groups named Mr. Kessler as one of their expert witnesses (or as a lay witness for that matter) and, as a result, Defendants have not had an opportunity to have their own experts evaluate and opine on his methods or to depose and cross-examine Mr. Kessler. This unfair prejudice alone warrants denial of the motion. *E.g., Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses); *cf. Forst v. Smithkline Beecham Corp.*, 639 F.Supp.2d 948, 957 (E.D. Wis. 2009) (concluding that due process right to cross-examine is not implicated by *amicus* which were not testimonial).

VI. A Map That Represent A Complete Departure From Maps Adopted By The Legislature Is Not An Appropriate Alternate.

Finally, the proposed map is simply, fundamentally inappropriate as an alternate, irrespective of the timing of its submission. Should the Court find a flaw in Act 43 or 44, it may act only to correct the identified flaw. That rule follows from the recognition that redistricting is "primarily the duty and responsibility of the State." *Perry v. Perez*, 565 U.S. ___, ___ (Jan. 20, 2012) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).⁶ And in discharging that duty, the State applies "criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry*, 565 U.S. at ___ (citing *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995)). Thus, it is important that any remedy reflect the Supreme Court's judgment that "[s]tates must have discretion to exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915.⁷

When a federal district court finds itself confronted with the "unwelcome obligation" of creating a legislative districting map, the "district court should take guidance from the State's recently enacted plan." *Id.* at ___. "[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying a state plan—even one that was itself unenforceable—to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act." *Id.* (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)). A state's policy

⁶ "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment.").

⁷ Had Representative Kessler wished to make his own exercise of political judgment and balance of competing interests law, the proper recourse would be for him to submit his proposed map to the Legislature of which he is a member. Having not done so, his personal political judgments cannot be said to stand for those of the State.

decision should not be put aside in the course of fashioning relief unless it is necessary to do so. *White*, 412 U.S. at 796 (reversing a District Court's chosen interim plan and remanding with directions that the court chose a plan more closely resembling the State's plan, even though State plan had been found to violate Equal Protection). "[I]n the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect." *Upham v. Seamon*, 456 U.S. 37, 40-41 (1982).

Amici expressly acknowledge in their brief that the proposed map they have submitted is "not based on the challenged legislative plan, but is a complete departure from it." *Amici Br.*, at 9. They go on to acknowledge that it is ordinarily outside the bounds of a federal court's jurisdiction to disregard completely the map enacted by a state legislature but attempt to get around this fact with the entirely unsubstantiated assertion that "the legislative plan is so completely permeated by political gerrymandering that it is impossible to separate infected districts from constitutional ones." *Id.* at 9-10. In addition to the problems created by the lack of any facts supporting this conclusion, the *amici's* analysis relies entirely on its mistaken assumption that political gerrymandering is *per se* unlawful. There is no constitutional prohibition against the use of political considerations in redistricting; instead, the U.S. Supreme Court has simply recognized that at some point, a political gerrymander could be so severe that it infringes upon constitutional rights; as the Court has noted "[t]he central problem is determining *when* a political gerrymander has gone *too far*." *Vieth*, 541 U.S. at 296 (emphasis added).

Amici believe that a plan constitutes an unconstitutional political gerrymander if the likely net result is that the percent of Democratic leaning voters in the state is greater

than the percent of state legislators who are Democrats. But again, the U.S. Supreme Court struck down this very proposition in *Veith*:

Deny it as appellants may (and do), this standard [appellants' proposed standard] rests upon the principle that groups (or at least political action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.

Id. at 288. Federal courts "may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms." *Id.* at 295. As *amici* have not attempted to develop a theory of harm other than the claimed lack of proportional representation to equivalently sized groups, they have not identified a *constitutional* defect. Their proposed map "curing" this non-constitutional defect is thus improper.

Conclusion

For any and all of the foregoing reasons, the motion of Bill Krause, Louis Fortis, Julilly Kohler, Angela Kvidera, Bruce Thompson and Don Wallace for leave to appear as *amici curiae* should be denied. The *amici* have not established that they have any unique interest in or perspective on the legality of 2011 Wisconsin Acts 43 and 44; they have not shown or attempted to show that plaintiffs' counsel needs assistance in this matter; they appear to be unfamiliar with the law governing the topic (political gerrymandering) on which they propose to advise the Court; their attempt to submit a proposed alternate plan violates this Court's scheduling order and Defendants' due process rights; and last but certainly not least, the plan they propose is fundamentally unsound as a proposed alternate because it rejects rather than embraces the policy choices of the State Legislature and is instead based on the policy choices *amici* believe are better.

Dated this 31st day of January, 2012.

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